SI & SI SDN BHD

v

HAZRABINA SDN BHD

FEDERAL COURT, JOHOR BAHRU
DATUK CHONG SIEW FAI CJ (SABAH & SARAWAK)
DATO' PEH SWEE CHIN FCJ
DATO' MOHAMED DZAIDDIN ABDULLAH FCJ
[CIVIL APPEAL NO: 02-3 OF 1995]
7 MAY 1996

CIVIL PROCEDURE: *Order 18 r 19(1)(b), (c) & (d) Rules of the High Court 1980 – Striking out – Winding-up petition – Petition struck out with damages to the respondent to be assessed – Appeal – Whether learned Judge acted correctly in awarding damages against the petitioner – Powers of the Court – Consideration of ss 218 & 221 Companies Act 1965*

COMPANY LAW: *Section 218 Companies Act 1948 – Winding-up petition filed – Respondent's bank accounts frozen – Inability to continue business activities – Application to strike out petition under O 18 r 19(1) of the Rules of the High Court 1980 – Claim for loss and damage – Application allowed with damages to the respondent to be assessed – Powers of the Court under s 221 Companies Act 1965 and O 18 r 19(1) of the RHC – Whether learned Judge erred in awarding damages to the respondent*

On 12 November 1990, the petitioner filed a winding-up petition against the respondent company under s 218(1) of the Companies Act 1965 (the Act) to recover the balance purchase price of goods sold and delivered together with interest. On 4 March 1991, an order for winding-up was granted but the order was subsequently set aside by consent of the parties and the petition was set down for full hearing. On 10 January 1991, the respondent filed an application to strike out the petition pursuant to O 18 r 19(1)(b), (c) & (d) of the Rules of the High Court 1980 (RHC). The respondent also prayed for damages on the ground that the issue and service of the petition had resulted in its bank accounts being frozen and the company being unable to carry on its business activities thereby causing the respondent loss and damage. The Court in granting the application under O 18 r 19(1)(d), struck out the petition and awarded damages to the respondent to be assessed and costs. On 22 July 1991, the petitioner obtained leave to appeal to the Supreme Court against the learned Judge's decision in awarding damages to the respondent. Hence the present appeal.

The only issue was whether the learned Judge had acted correctly when he awarded damages to the respondent after striking out the winding-up petition.

Held:

Per Mohamed Dzaiddin Abdullah FCJ (delivering the judgment of the Court):

[1] The Court's powers on hearing the petition is governed by s 221 of the Act, which after hearing the parties, may dismiss it with or without costs, or adjourn it conditionally or unconditionally or may make an interim or other order that it thinks fit. There is therefore no provision in the section for the Court when dismissing the petition to award damages to the respondent, although an affidavit in opposition to the petition may pray for damages.

[2] It is not within the contemplation of O 18 r 19(1) of the RHC to grant damages to the successful applicant, in addition to its powers under the Rules or under its inherent jurisdiction. Clearly, the policy of O 18 r 19 RHC is to prevent the improper use of the Court's machinery and therefore in a proper case it will summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation.

[3] A claim for damages should not be brought under a winding-up petition or in an application to strike out the said petition under O 18 r 19(1) of the RHC, but ought to be filed as a separate action by way of writ for malicious prosecution or an abuse of the process of the Court.

[4] In the circumstances, the learned Judge was wrong, upon striking out the appellant's petition for winding-up of the respondent as being an abuse of process, to grant damages to the respondent. There has to be a separate action for damages.

[Appeal allowed with half costs to the appellant. Deposit to be refunded]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Aturan 18 k 19(1)(b), (c)& (d) Kaedah-kaedah Mahkamah Tinggi 1980 – Pembatalan – Petisyen penggulungan – Petisyen dibatalkan dengan gantirugi kepada responden untuk ditaksirkan – Rayuan – Samada Hakim yang bijaksana bertindak dengan betul dalam memberikan gantirugi terhadap pempetisyen – Kuasa-kuasa Mahkamah – Pertimbangan ss 218 & 221 Akta Syarikat 1965*

UNDANG-UNDANG SYARIKAT: *Seksyen 218 Akta Syarikat 1948 – Petisyen penggulungan difailkan – Akaun bank responden dibekukan – Tidak dapat meneruskan aktiviti-aktiviti perniagaan – Permohonan untuk membatalkan petisyen di bawah A 18 k 19(1) Kaedah-kaedah Mahkamah Tinggi 1980 – Tuntutan bagi kerugian dan gantirugi – Permohonan*

dibenarkan dengan gantirugi kepada responden untuk ditaksirkan – Kuasa-kuasa Mahkamah di bawah s 221 Akta Syarikat 1965 dan A 18 r 19(1) KMT – Samada Hakim yang bijaksana telah tersalah pertimbangan dalam memberikan gantirugi kepada responden

Pada 12 November 1990, pempetisyen telah memfailkan satu petisyen penggulungan terhadap syarikat responden di bawah s 218(1) Akta Syarikat 1965 ('Akta tersebut') untuk mendapatkan semula baki harga belian barangan yang telah dijual dan dihantar-serahkan beserta faedah. Pada 4 Mac 1991, satu perintah untuk penggulungan telah diberikan tetapi perintah tersebut telah berikutan itu diketepikan dengan persetujuan pihak-pihak tersebut dan petisyen itu ditetapkan untuk perbicaraan penuh. Pada 10 Januari 1991, responden telah memfailkan satu permohonan untuk membatalkan petisyen itu selaras dengan A 18 k 19(1)(b), (c) & (d) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Responden telah juga memohon untuk mendapatkan gantirugi atas alasan bahawa pengeluaran dan penyampaian petisyen tersebut telah mengakibatkan akaun-akaun banknya dibekukan dan syarikat tersebut tidak dapat menjalankan aktiviti-aktiviti perniagaannya yang dengan itu menyebabkan responden mengalami kerugian dan gantirugi. Mahkamah dalam membenarkan permohonan di bawah A 18 k 19(1)(d), membatalkan petisyen dan memberikan gantirugi kepada responden untuk ditaksirkan dan kos. Pada 22 Julai 1991, pempetisyen telah mendapatkan kebenaran untuk merayu kepada Mahkamah Agung terhadap keputusan Hakim yang bijaksana memberikan gantirugi kepada responden. Yang dengan itu mengkibatkan rayuan ini.

Satu-satunya isu ialah samada Hakim yang bijaksana telah bertindak dengan betul bilamana beliau memberikan gantirugi kepada responden selepas membatalkan petisyen penggulungan tersebut.

Diputuskan:

Oleh Mohamed Dzaiddin Abdullah HMP (menyampaikan keputusan Mahkamah):

[1] Kuasa-kuasa Mahkamah berhubung mendengar petisyen ditentukan oleh s 221 Akta, yang mana selepas mendengar pihak-pihak, boleh menolaknya dengan atau tanpa kos, menangguhkannya dengan bersyarat atau tanpa bersyarat atau mungkin membuat satu perintah interim atau perintah yang lain yang difikirkan sesuai. Dengan itu, tidak terdapat peruntukan dalam seksyen tersebut, bagi Mahkamah, ketika menolak petisyen, memberikan gantirugi kepada responden, walaupun sesuatu afidavit yang menentang petisyen tersebut boleh memohon untuk mendapatkan gantirugi.

[2] Ianya bukan di dalam pertimbangan A 18 k 19(1) KMT untuk memberikan gantirugi kepada pemohon yang berjaya sebagai tambahan kepada kuasa-kuasanya di dalam kaedah tersebut atau di bawah bidangkuasa sedia adanya. Jelasnya, dasar A 18 k 19 KMT adalah untuk menghalang

penggunaan dengan cara tidak betul akan jentera Mahkamah dan dengan itu dalam sesuatu kes yang wajar ianya akan secara terus menghalang jenteranya daripada digunakan sebagai suatu cara penindasan dan menyusahkan dalam proses litigasi.

[3] Sesuatu tuntutan gantirugi seharusnya tidak dikemukakan di bawah satu petisyen penggulungan atau dalam satu permohonan untuk membatalkan petisyen di bawah A 18 k 19(1) KMT, tetapi haruslah difailkan sebagai satu tindakan berasingan melalui writ untuk pendakwaan niat jahat atau penyalahgunaan proses Mahkamah.

[4] Dalam keadaan yang wujud, Hakim yang bijaksana adalah salah, setelah membatalkan petisyen perayu untuk penggulungan responden sebagai suatu penyalahgunaan proses untuk memberikan gantirugi kepada responden. Haruslah terdapat tindakan untuk gantirugi yang berasingan.

[Rayuan dibenarkan dengan sebahagian kos kepada perayu. Deposit hendaklah dikembalikan]

Cases referred to:
Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd [1989] 2 MLJ 423
Quartz Hill Consolidated Gold Mining Co v Eyre [1883] 11 QBD 674
Peer Mohamed bin Abdul Aleez v Pahang Investments Public Ltd Co Mallal's Digest, 1989 para 149
OIW Retailers Ltd v Felview Pty Ltd [1989] 7 ACLC 519

Legislation referred to:
Companies Act 1965, ss 218(1), 221
Companies (Winding-up) Rules 1972
Rules of the High Court, O 18 r 19(1)(b), (c), (d)

Other sources referred to:
Ford's Principles of Corporations Law, 6th Edn, p 818
McGregor on Damages, 14th Edn, para 1370
Supreme Court Practice 1995 Vol 1 para 18/19/33

For the appellant - Ong Ban Chai; M/s Ong Ban Chai & Co
For the respondent - Sashi Menon; M/s Majid Krishna Menon & Lee

JUDGMENT

Mohamed Dzaiddin Abdullah FCJ:

This appeal arose from an oral decision of the learned Judge of the High Court Johor Bahru given on 26 May 1991 with respect to an award of damages following the striking out of a winding-up petition by the Court.

After hearing Counsel on 12 April 1996, we allowed the petitioner's appeal with half costs to the petitioner and now give our reasons.

The background to this appeal can be summarised as follows. On 12 November 1990, the appellant, who for the sake of clarity shall be referred to as the petitioner, filed a winding-up petition against the respondent company under s 218(1) of the Companies Act 1965 (the Act) on the ground that the respondent was unable to pay its debts, ie RM18,260.70, being the balance purchase price of goods sold and delivered together with interest. On 4 March 1991, an order for winding-up was accordingly granted by the Court. However, by consent of the parties, the said winding-up order was set aside and the petition was set down for full hearing. Meanwhile, on 10 January 1991, the respondent filed an application by way of a notice of motion pursuant to O 18 r 19(1)(b), (c) and (d), seeking an order to strike out the petition and for damages and costs. On 26 May 1991, the learned Judge granted the application and ordered that the winding-up petition be struck out; that the petitioner do pay damages to the respondent to be assessed by the Registrar and, lastly, the petitioner do pay the respondent the costs of the proceedings. On 22 July 1991, leave to appeal to the then Supreme Court against the learned Judge's decision in awarding damages to the respondent was granted. Hence, this present appeal.

In arriving at his decision for striking out the winding-up petition under O 18 r 19(1)(d) RHC and awarding damages and costs against the petitioner, there is no doubt in our mind that the learned Judge had considered the supporting affidavit of Zainuddin Alani, a director of the respondent, affirmed on 10 January 1996. On the issue of damages, his Lordship must have placed reliance on the following paragraphs of the said affidavit:

> 15. I verily believe the present proceedings herein are scandalous, frivolous, vexatious and it is an abuse of the process of the Court.
>
> 16. The petitioner having withdrawn the earlier suit against the respondent is now estopped from proceeding with this action.
>
> 17. Upon the issue and the service of the winding-up petition, the Bank accounts of the respondent have been duly frozen and the respondent is unable to use its banking accounts. As the said account is frozen the respondent is unable to carry on its business activities and undue loss and damage has occurred to the respondent.

However, in the "Oral Decision", the learned Judge did not give any reason for awarding damages against the petitioner but appeared to have followed his earlier decision in *Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd* [1989] 2 MLJ 423, where the facts are quite similar to the facts herein. At p 425 para F, his Lordship concluded:

> I could not help thinking that the filing of the notice of discontinuance and the subsequent presentation of the winding-up petition were all acts calculated to circumvent the normal course of going to trial after the dismissal of the application for summary judgment under O 14 and to embarrass the respondent. In the

circumstances I considered the presentation of the winding-up proceedings as an abuse of the process of the Court and I accordingly granted an order in terms of the first three prayers of the application, i.e. that the petition be struck out, that costs of the application be borne by the petitioner and that a date be fixed for enquiry into the damages suffered by the respondent.

At this juncture, we say, with respect to the learned Judge, that in the above case, he has not given his reasons for granting damages against the respondent in the same application. We tend to think that he did not have the full benefit of reading the decision of the English Court of Appeal in *Quartz Hill Consolidated Gold Mining Co v Eyre* [1883] 11 QBD 674.

Thus, this appeal raised a single issue as to whether the learned Judge was right in awarding damages against the petitioner in the winding-up petition after striking out the petition as being an abuse of the process of the Court. It is therefore necessary to examine the legal issues involved in this appeal.

In *Peer Mohamed bin Abdul Aleez v Pahang Investments Public Ltd Co* Mallal's Digest, 1989 para 149, P filed a winding-up petition against D. The petition which was served on D was advertised before due clearance had been obtained from the Registrar of the High Court in accordance with the Companies (Winding-up) Rules 1972. Thereafter P filed a notice of discontinuance of the action against D. The notice was served on D. D nevertheless filed an affidavit opposing the petition. D claimed that substantial damage had been caused to them by P filing the petition and by having newspaper coverage on baseless and speculative allegations. D asked that the petition be struck out and that damages be paid by P.

Ajaib Singh J dismissed the petition of P. He was of the view that D's claim for damages against P could not be entertained in the winding-up proceedings as damages did not come within the purview of the proceedings. He stated that to recover any damages from P, D would have to proceed against P by way of a separate action in Court.

Although the learned Judge did not give his reasons for the conclusion, nevertheless, we agree with him for the following reason. It is patently clear that P's petition was made under s 218 Companies Act 1948. The Court's powers on hearing the petition is governed by s 221, which after hearing the parties, may dismiss it with or without costs, or adjourn it conditionally or unconditionally or may make an interim or other order that it thinks fit. There is therefore no provision in the section for the Court when dismissing the petition to award damages to D, although an affidavit in opposition to the petition may pray for damages. It can only dismiss the petition with or without costs.

On the other hand, in the present case, the learned Judge, after having found that the presentation of the winding-up petition by the petitioner as an abuse of the process of the Court under O 18 r 19(1)(d), ordered, in addition to

giving costs, that the petitioner do pay damages to the respondent to be assessed by the Senior Assistant Registrar. In our view, it is not within the contemplation of O 18 r 19(1) RHC to grant damages to the successful applicant, in addition to its powers under the rule or under its inherent jurisdiction. Clearly, the policy of O 18 r 19 RHC is to prevent the improper use of the Court's machinery and therefore in a proper case it will summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. See: *The Supreme Court Practice 1995* Vol 1 para. 18/19/33 "Abuse of the process of the Court".

It has been said that an application for winding-up, even if subsequently dismissed as being ill-founded, can damage a solvent company's reputation. See: *Ford's Principles of Corporations Law*, 6th Edn p 818. However, it has been established from authorities that any action for damages against a petitioner, whose petition for winding-up has been struck out, can only be brought by an entirely separate suit founded on a tort of malicious prosecution *(Quartz Hill Consolidated Gold Mining Co v Eyre) (supra)* or for abuse of process *(OIW Retailers Ltd v Felview Pty Ltd)* [1989] 7 ACLC 519.

In the present case, it would appear to us that the respondent's claim for damages in the notice of motion, for which the learned Judge ordered that damages be assessed by the Senior Assistant Registrar, was based on the allegations that as a result of the issuance and the service of the winding-up petition against the respondent, its bank accounts were frozen and it was unable to carry on its business activities. In the result, the respondent claimed that it suffered undue loss and damage. However, whether or not he can succeed depends on the evidence. *Quartz Hill Consolidated Gold Mining Co v Eyre* is the case in point. It is a leading case on malicious company liquidation proceedings. In that case, the plaintiff brought an action against the defendant alleging that the defendant falsely and maliciously and without reasonable or probable cause presented a petition for the winding-up of the plaintiff company. The said petition was presented to the Court and was advertised in the London Gazette and two daily newspapers. A date of hearing was given, but immediately after the presentation of the petition, the defendant ascertained that his shares had been sold and that the transfer had been registered. He therefore gave notice that the petition would be withdrawn. The petition was never served upon the plaintiff company. Ultimately, the Court ordered that the petition be dismissed with costs. The English Court of Appeal decided that an action would lie for falsely and maliciously and without reasonable or probable cause presenting a petition under the Companies Acts 1862, 1867 to wind-up a trading company, even though no pecuniary loss or special damage to the company could be proved, for the presentation of the petition was, from its very nature, calculated to injure the credit of the company. According to *McGregor on Damages*, 14th Edn para 1370, pecuniary loss by injury, or loss of business, may be included under the head of damages for malicious prosecution.

In *OIW Retailers Ltd v Felview Pty Ltd (supra)*, the defendant company, a shareholder of the plaintiff company, presented a winding-up petition against the plaintiff company on the ground that the directors of the plaintiff company had preferred their own interests to those of the members or alternatively acted in an unfair or unjust manner. The application was supported by an affidavit sworn by B, who was not a party to the winding-up application. B had told a journalist, whose article had referred to the application. Consequently, the application was dismissed by the Court as an abuse of the process with costs to be taxed. The plaintiff company then brought the present action against the defendant company and B claiming damages, including exemplary damages, for malicious prosecution and for abuse of process. The Queensland Supreme Court held there was no malicious prosecution but awarded general damages for abuse of process. The Court found that the plaintiff company had suffered damage by the presentation of the winding-up petition and the publication of the article giving notice to the public at large. It was a trading company and its creditors displayed some apprehension on hearing of the presentation of the petition.

Thus, the above two cases, aside from establishing that an unjustifiable application for winding-up a company can lead to an action for damages against petitioner for malicious prosecution or for abuse of process of the Court, do fortify our view that a claim for damages should not be brought under a winding-up petition or in an application to strike out the said petition under O 18 r 19(1) RHC, but ought to be filed as a separate action by way of a writ.

In the circumstances of the case, and for the above reasons, we are of the opinion that the learned Judge was wrong, upon striking out the appellant's petition for winding-up of the respondent as being an abuse of process, to grant damages to the respondent. There has to be a separate action for damages.

Accordingly, we allowed the appeal with half costs of the appeal to the appellant. We also ordered the deposit to be refunded.

Reported by Cindy Chan